

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The Court herein considers the Eleventh Interim Fee Application (“Eleventh Application”) of Simpson, Thacher & Bartlett (“STB”), attorneys for Richard C. Breeden, as trustee in the consolidated case (“Trustee”). The Eleventh Application seeks payment of professional fees in the amount of \$1,573,285.50 and reimbursement of expenses in the amount of \$197,807.22

incurred during the period July 1, 1999 through October 31, 1999.¹ This Eleventh Application was submitted to Stuart, Maue, Mitchell and James, Ltd. (“Fee Auditor”) in accordance with the Court’s Amended Order dated December 2, 1996, regarding Fee Applications subject to review by the Fee Auditor (“Amended Order”). The report of the Fee Auditor (“Auditor’s Report”) was filed with the Court on February 29, 2000. On March 9, 2000 the Official Committee of Unsecured Creditors (“Committee”) filed opposition to the Eleventh Application and the United States Trustee (“UST”) filed her opposition on March 14, 2000. On March 15, 2000, STB filed a response to the Auditor’s Report (“Response”) wherein STB modified the amount sought for reimbursement of expenses to the adjusted amount of \$197,548.22.² STB filed reply to the respective opposition of the Committee and the UST on April 6, 2000. The UST filed a statement responsive to STB’s reply on April 12, 2000. The Eleventh Application came on for a hearing before this Court on April 13, 2000, at which time the Court approved a provisional award of \$1,175,000 in fees and \$150,000 in expenses to STB.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b)

¹It should be noted that the Eleventh Application erroneously identifies the Eleventh Compensation Period as June 1, 1999 through October 31, 1999. Upon review of STB’s contemporaneous time sheets, it is clear that compensation is sought only for the period July 1, 1999 through October 31, 1999.

²No modification was made to the fees sought in STB’s initial application.

and 28 U.S.C. § 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS, ARGUMENTS AND CONCLUSIONS

Familiarity with the prior decisions of this Court which dealt with the first ten fee applications of STB is presumed and they will be referenced herein to the extent necessary.³

The Auditor's Report generally identifies numerous entries in STB's time records offered in support of its Eleventh Application as falling into twenty-one general categories which "Appear to Violate Court Guidelines." In addition, the Auditor's Report isolates approximately 101 specific and limited categories or tasks which it calls to the Court's attention for further review and analysis.

As indicated, STB provided specific replies to the Auditor's Report in their Response. In that Response, STB concedes to a voluntary reduction in expenses sought in the original Eleventh Application by the net sum of \$259.00, which the Auditor's Report indicated was reimbursement for travel expenses incurred by the Trustee, rather than STB. As indicated in note 1, *supra*, STB made no adjustment to its fee request.

STB again challenges the Auditor's Report insofar as it identifies "Allegedly Vaguely Described Tasks," "Multiple Professionals at Events," "Legal Research," "Claimed

³This Court entered Memorandum-Decisions, Findings of Fact, Conclusions of Law and Orders dated February 5, 1997, August 13, 1997, March 20, 1998, August 6, 1998, November 16, 1998, June 1, 1999, April 11, 2000, July 12, 2000, October 18, 2000 and December 28, 2000, respectively. STB moved to reconsider the Order of August 13, 1997 and on February 9, 1998, the Court entered a Memorandum-Determination, Findings of Fact, Conclusions of Law and Order reconsidering that Order. Familiarity with that Memorandum-Determination is also presumed.

Administrative or Clerical Tasks and Paralegal Activities,” “Travel Time,” and “Blocked Billing Entries,” making many of the same observations that it has made previously in criticizing the Auditor’s Reports relating to its First through Tenth Fee Applications. Those criticisms need not be reiterated an Eleventh time in this decision. (*See* Response at ¶ B at 4-12).

With regard to the 101 more specific categories identified by the Fee Auditor as those in which “The Court May Wish to Examine for Relevance, Necessity, and Reasonableness,” STB primarily responds to the Fee Auditor’s “Firm Staffing” review, specifically, “Personnel Who Billed 20.00 or Fewer Hours,” “Long Billing Days (12.00 Hours or More),” “Intraoffice Conferences,” “Fee Applications” and “Other Specific Projects,” namely STB’s provision of assistance to Saperston & Day, special counsel to the Trustee, in certain document discovery procedures and in litigation identified as the “DOL Suit”. (*See* Response at ¶ C.4 at 17; Auditor’s Report at ¶ 4.3; Auditor’s Report at Exhibit T-4). With regard to the “Long Billing Days,” referred to in the Auditor’s Report, STB asserts “[t]hat there were various efforts undertaken during the compensation period that demanded very long hours on the part of [STB] attorneys and paralegals” (*See* Response at ¶ C.1 at 13). Specifically, STB identifies 1) “Preparation of Trustee’s Brief on Appeal of Bank Lien Litigation” and 2) “Other Matters” such as “preparations for the motion regarding the deposition under the Hague Convention, continued review and preparation of information regarding investors with insurance certificates and preparation of the Trustee’s response to the Abatamarco appeal of the Generali settlement approval before the Bankruptcy Appellate Panel.” (*See* Response at ¶ C.1 at 13-14).

The Auditor’s Report identifies a total of 251.20 hours being consumed on these “Long Billing Days” for which a fee of \$37,513.40 is requested. (*See* Auditor’s Report at Exhibit L).

In the instant Application, STB attributes these some 251 hours to the above-reference projects. While the Court is cognizant of the time investment required of such projects, some 47.3 hours totaling \$4,644.40 were either billed to tasks other than those described above or cannot be adequately identified as relating to those projects. STB has offered no substantive justification for working extended billing time on those hours and to that end the Court will reduce those fees by twenty-five per cent for a total of \$1,161.10.⁴ In doing so, the Court has been careful not to exclude those same hours under other categories of services identified in the Auditor's Report which were performed on the long billing days.

The Court once again considers STB's time devoted to "Multiple Professionals at Events," "Intraoffice Conferences," and "Claimed Administrative or Clerical Tasks and Paralegal Activities." Having written ten prior decisions dealing with each of the foregoing categories, the Court will not reiterate the basis for its adjustments except as set forth below:

Multiple Professionals at Events⁵

As reflected on Auditor's Report Exhibit B - disallow \$6,409.50.

⁴According to the Auditor's Report, all of these so-called "Long Billing Days" were days in which any timekeeper billed twelve hours or more in a given day. Aside from those projects discussed by STB in its response which were time sensitive, the Court knows of no reason why STB needed to work longer than 8 hours per day on any other project relating to this case. As a result, the Court will reduce 25% of STB's fees in this category allowing charges to the estate for an 8 hour day.

⁵Much of the time disallowed on Exhibit B involved the multiple attendance of STB partners and associates at depositions, court hearings and meetings with the Trustee and the UST.

Intraoffice Conferences⁶

As reflected on Auditor's Report Exhibit O-1 - disallow \$27,357.08

Claimed Administrative or Clerical Tasks and Paralegal Activities⁷

As reflected on Auditor's Report Exhibits D-1, D-4 and D-5, notwithstanding STB's consistent assertion that the services reflected on these Exhibits "require the exercise of the paralegals professional judgment," the Court has reviewed the Exhibits thoroughly and concludes that of the \$115,700 reflected here, \$78,548.50 should be disallowed. As the Court has observed in its prior fee decisions, it cannot justify charging the creditors in this case tens of thousands of dollars simply because STB may choose to bill its private clients in a similar fashion for these clerical tasks.

Assist in Preparation of Documents and Assist in Service of Documents

The Fee Auditor identifies 263.8 hours or \$26,167.87 which STB attributes to "Assist in Preparation of Documents," and 347.60 hours or \$34,266.70 which STB attributes to "Assist in Service of Documents." *See* Fee Auditor's Exhibits E-1 and E-2. In its prior decisions, the Court has reduced STB's fee request with regard to these services, primarily because of the vagueness

⁶Time disallowed on Exhibit O-1 resulted from intra-office conferences generally between three or more timekeepers, which in the Court's experience and familiarity with this case was an unnecessary overutilization of personnel.

⁷For example, voluminous entries utilizing such terms as "Filing," "Retrieving," "Update," "Loading," "Organize," "Review," and "Complete" and phrases such as "Reviewed and Organized Important Documents," do not support the consistent use of paralegal personnel whose time is billed on average at \$100 per hour during the current application period.

of the entry. In the instant Eleventh Application, the Court finds the entries in STB's time records to be much more specific with regard to the preparation and service of documents and will only disallow \$2,210.

Fee Applications:

The Eleventh Application seeks total fees of \$60,876.20 in connection with the preparation and defense of STB's fee applications. The Court will disallow \$55,000 in keeping with the policy set out in prior decisions.

Shamrock Holdings Group, Inc.

The Eleventh Application includes \$15,713 devoted to the Shamrock Bankruptcy. (*See* Fee Auditor's Exhibit Y-3) Both the UST and the Committee have objected from time to time to services expended by STB relating to the Shamrock Holdings Group bankruptcy. The Court has reviewed Exhibit Y-3 to the Auditor's Report and concluded that during the period covered by the Eleventh Application, the bulk of STB's services were rendered not on behalf of Shamrock , but rather to the Trustee to the extent that the Consolidated Estates owned 100% of the Shamrock stock and had a vested interest in the confirmation of Shamrock's Chapter 11 plan. Therefore, the Court will not make any adjustment to the fees requested in this category.

Patrick Bennett Criminal Trial

During the Eleventh Application period, STB services dealt primarily with the preparation of a letter to be sent by the Trustee of the Consolidated Estates to the U.S. District Judge

presiding over Patrick Bennett's criminal sentencing. While the Court is somewhat hard pressed to find any direct benefit of those services for the creditors of these estates, it will not disallow compensation for the services.

Atrium Lease Dispute

The Committee criticizes STB for its work reflected in the present Eleventh Application related to Bennett Atrium Ltd. ("BAL"). The Committee asserts that matters having to do with BAL were transferred to the law firm of Whiteman Osterman & Hanna due to STB's potential conflict of interest. STB responds that its services during the Eleventh Application pertaining to BAL involved only the lease of space from the new owner of the building - a matter for which it had no potential conflict. A review of Exhibit W-3 attached to the Auditor's Report, however, does not totally support STB's disclaimer. Upon review of that Exhibit, the Court will disallow \$2,541.50 in fees for service which appear to be directly related to the sale of the Atrium Building.

TPC Sale

The Court has examined the UST's Objection to the total fees sought by STB for services relating to the sale of TPC to Equivest Finance Inc., as well as STB's response and the Court finds no merit to the Objection. Therefore, the Court will not make any adjustment to the amount isolated on Exhibit S-3 attached to the Auditor's Report.

Amendment to Plan and Disclosure Statement and Response to Disclosure Statement Objections

Exhibits FF-1 and FF-2 attached to the Auditor's Report isolated a total of 73.8 hours or \$30,192.50 devoted to the Consolidated Estates Plan and Disclosure Statement. The Committee asserts that much of that time was consumed as the result of the Trustee's "adamant insistence" upon including a 1994 Report issued by the U.S. General Accounting Office ("GAO Report") dealing with dollar amount distributions in Chapter 7 bankruptcy cases. The Committee notes that the Court "correctly determined that the Trustee's discussion of the GAO Report was meaningless and must be omitted from the Disclosure Statement." (*See* Objections of the Committee dated January 6, 2000, ¶¶ 8-12) Thus, the Committee observes that the fees of STB devoted to this exercise should not be borne by the unsecured creditors. STB counters with its argument that to accept the Committee's criticism is to "denude a party of effective legal representation." *See* Response of STB to the Objections of the U.S. Trustee and the Creditors Committee dated April 5, 2000 at page 15. STB then goes on to justify the Trustee's decision noting that this Court's ruling prohibiting the inclusion of the GAO Report data was due solely to "disparity in the size of the cases in the GAO study and the size of this case." *Id* at page 16. STB notes that all the Trustee sought to accomplish by inclusion of the GAO study was to place in perspective the expenses incurred by the Trustee versus the anticipated net recovery to creditors to assist those same creditors in voting on a plan.

While the Court does not take issue with STB's assertion that it should not be penalized for litigating a reasonable position of the Trustee, it does believe that inquiry is warranted where counsel urges a marginally frivolous position on the Court simply because the client insists that

such an argument be made. STB maintains that the purpose of the inclusion of the GAO Report was to display to creditors a balancing of expenses incurred by the Trustee with the quantum and timing of recovery. While that objective in and of itself is questionable when considered within the mandates of Code § 1125, it becomes even more questionable in the context of a liquidating plan. Further, the GAO Report sought to be included in the Disclosure Statement would have conveyed the classic “apples and oranges” comparison providing little or no value to creditors and, in fact, may have been somewhat misleading. The Court must agree with the Committee that the unsecured creditors should not have to bear the cost of this phase of the Disclosure Statement process.

Unfortunately, from a review of the Fee Auditor's Exhibit FF-1 and FF-2, the time devoted to the GAO Report cannot be isolated, therefore, the Court will disallow 30% of the fees reflected in those exhibits or the sum of \$9,058.

Assistance to Saperston & Day

The Court has reviewed Exhibit Y-2 attached to the Auditor's Report which reflects 42.40 total hours or \$4,265 in fees attributed to STB's assistance provided to Special Counsel, Saperston & Day. The Court notes that all of the time reflected was expended by STB's paralegals and does not appear to have been unreasonable under the circumstances of the relationship between STB and Saperston & Day. The Court makes no adjustment.

In its Response to Objections of the UST and the Committee dated April 5, 2000, STB requests, *inter alia*, that the Court include in its decision on the instant Eleventh Application “all, or as many as possible, of the unrul’d upon interim fee applications, in keeping with the

Congressional intent that professionals engaged in a bankruptcy case not be required to finance case administration and await long periods of time before being compensated, which in and of itself is an effective fee reduction given the time value of money and does not provide compensation commensurate with nonbankruptcy legal representation.” *See In re Drexel Burnham Lambert Group, Inc.*, B.R. 13, 22 (Bankr. S.D. N.Y. 1991). STB also makes reference to an order entered in a large Chapter 11 case pending in the U.S. Bankruptcy Court for the Southern District of New York in which U.S. Bankruptcy Judge Burton Lifland provided for an apparent automatic award of 85% of professional fees and 100% of expense reimbursement requested by the case professionals. The flaw in the argument being advanced by STB is the assumption that it will ultimately be awarded the full amount of its fee request. That, of course, is not always the case. “Holdbacks” are not intended to penalize a professional in a Chapter 11 case, they are utilized by bankruptcy courts primarily to avoid the need to order disgorgement of fees in large cases where there are a series of fee interim fee applications. Some courts also utilize “holdbacks” as an incentive to motivate professionals in large Chapter 11 cases. *See In re Child World, Inc.*, 185 B.R. 14, 18 (Bankr. S.D.N.Y. 1995); *In re Bank of New England*, 134 B.R. 450, 458 (Bankr. D. Mass 1991) *aff’d*. 142 B.R. 584 (D. Mass. 1992).

While this Court is aware of vastly different approaches to the review and approval of fee applications taken by bankruptcy courts throughout the nation, until Congress decides to remove the Court from the fee application process altogether, it is not the intention of this Court to abdicate what it perceives as its responsibility under Code §§ 330 and 331 to review professional fee applications in the interest of attracting “mega” cases to the Northern District of New York. STB chooses to rely on the notion that because Congress installed the “cost of comparable

services” standard in Code § 330(a)(3)(E), its intent was that professionals in bankruptcy cases be compensated in the same manner as they would be when billing a private client in a non-bankruptcy matter. Therefore, a professional billing a bankruptcy estate should be paid in full upon receipt of the billing statement. That is simply not the reality of representing debtors in large Chapter 11 cases that span many months if not years. It is also not the reality if a bankruptcy court steps up to the very significant responsibility imposed upon it by Congress via Code §§ 330 and 331.

Finally, a review of STB's Eleventh Interim Application indicates that through June 30, 1999, it had sought fees and expenses in the aggregate of \$29,890,049 and had been actually awarded \$22,510,009 (which at that point included provisional awards on its Seventh through Tenth Interim Fee Applications). *See* Eleventh Application dated January 28, 1999 at pages 2-3. Those totals indicate that STB has actually received 75% of total amount of fees and disbursements requested. The Court does not believe that a 25% holdback on an interim basis is unreasonable given the size of the consolidated estates, the number of professionals who regularly file fee applications and the fact that this Court has issued final rulings on the interim fee applications which it is not required by the Statute to do. *See In re Child World, Inc.*, 185 B.R. at 18.

Expenses

The instant Eleventh Application again seeks reimbursement for expenses identified as “Word Processing,” “Desktop Publishing,” “Proof-Reading,” “Overtime Meals” and “Restaurant/STB/Cafeteria.” These expenses total \$21,842.70 and shall be disallowed consistent

with prior decisions. In addition, STB has voluntarily deleted a request for reimbursement of \$259 for a taxi charge apparently on Exhibit MM to the Fee Auditor's Report.

In summary, the Court makes the following reductions to fees and expenses sought in the Eleventh Application:

<u>Total Requested Fees</u>	\$1,573,285.50
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Disallowances:

Long Billing Days	1,161.10
Multiple Professionals at Events	6,409.50
Intra Office Conferences	27,357.08
Administrative or Clerical Tasks and Paralegal Activities	78,548.30
Fee Applications	55,000.00
Assist in the Preparation and Service of Documents	2,210.00
Atrium Lease Dispute	2,541.50
Amendments to Plan and Disclosure Statement and Response to Disclosure Statement Objections	9,058.00
Provisional Fee Award granted on April 13, 2000	1,175,000.00

<u>Net Total Fees Allowed:</u>	216,000.02
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<u>Total Requested Expenses (as adjusted):</u>	\$197,548.22
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Disallowances:

Office Overhead	21,842.70
Provisional Expenses Awarded on April 13, 2000	150,000.00

<u>Net Total Expenses Allowed:</u>	25,705.52
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Based on the foregoing

ORDERED that the fees and expenses requested by STB in its Eleventh Application shall be allowed and disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses totaling

\$241,705.54 shall not be made from encumbered assets of the consolidated Estates.

Dated at Utica, New York

this 14th day of January 2002

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge